



August 16, 2019

VIA FOIA ONLINE

**U.S. Environmental Protection Agency
Headquarters**

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
Phone: (202) 566-1667

Regional Freedom of Information Officer
U.S. EPA, Region 6
1445 Ross Avenue (6MD-OE)
Dallas, TX 75202-273

Re: Freedom of Information Act Request: Acting Assistant Administrator for the Office of Air and Radiation Anne Idsal.

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, as amended (“FOIA”), and the EPA regulations at 40 C.F.R. § 2.100, *et seq.* This request is sent to you because you were identified as the proper person to receive such requests. If this request should be directed at another person, please forward this request to that person.

Sierra Club is a leading non-governmental organization seeking to educate and mobilize the public on issues of climate change, fossil fuel energy and clean energy, as well as the organization’s long-standing interest in government accountability and transparency.

REQUESTED RECORDS¹

Sierra Club requests the following records in the possession, custody, or control of the U.S.

¹ “Records” means information of any kind, including writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, telephone conversations, telefaxes, emails, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. Without limitation, the records requested include records relating to the topics described below at any stage of development, whether proposed, draft, pending, interim, final or otherwise. All of the foregoing are included in this request if they are in the possession of or otherwise under the control of EPA, National Headquarters and all of its Offices, Regions and other subdivisions.

Environmental Protection Agency (“EPA”) concerning Acting Administrator of the Office of Air and Radiation (“OAR”) Anne Idsal for the period December 1, 2017 through the present:

1. All records relating to EPA’s ethics or conflict of interest review for Anne Idsal, including, but not limited to, any formal or draft ethics opinion concerning Anne Idsal’s conflicts of interest or any recommendations relating to recusal from matters regarding the Texas Regional Haze 5 Year Program Report, hereinafter (“Texas Regional Haze”) and the Texas SO₂ Transport State Implementation Plan, hereinafter (“Texas SO₂ SIP”).²
2. All records generated or provided by Anne Idsal to EPA concerning any potential conflict of interest relating to Texas Regional Haze and the Texas SO₂ SIP.
3. All records reflecting communications between employees of EPA regarding any potential conflict of interest involving Ms. Idsal and relating to Texas Regional Haze and the Texas SO₂ SIP.
4. All records reflecting communications between EPA, the Department of Justice, Texas Center for Environmental Quality (“TCEQ”), and the Texas Attorney General relating to any potential conflict of interest involving Ms. Idsal and regarding Texas Regional Haze and the Texas SO₂ SIP.

For purposes of this request, the term “person outside of EPA” means any person who is **not** an employee within the EPA, subject to the following exclusions: We are **not** seeking communications to or from persons employed elsewhere within the Executive Branch of the United States; persons employed by the executive branch of any state (i.e. state agencies); or persons who have an executed legal contract to provide consulting or other services to EPA. You may also specifically exclude from processing and release any records that are publicly available (e.g., through regulations.gov).

This request includes communication related to EPA that is or was on any system or device, computer, phone, smartphone, tablet, email account, cloud, server or other communication system either **personal or business** that is or was owned **or** operated by Ms. Idsal or otherwise established for the purposes of communicating with Ms. Idsal.

This request includes all emails or other communications from any **personal** account operated by Ms. Idsal which have been forwarded into an EPA government email account.

This request applies to all email accounts assigned to or operated by Ms. Idsal, whether on an official EPA email address or server or not, that relate to official business of EPA. This request applies to so-called “alias” email accounts that may or may not include the name Anne or Idsal in the email address.

² See EPA, Office of the Regional Administrator, Anne Idsal Recusal Statement Memorandum at 3 (July 24, 2018), available at https://www.cenews.net/assets/2018/08/06/document_gw_05.pdf; see generally Reilly, Sean, E&E News, Texan at air office helm positioned to settle old scores (Aug. 8, 2019), available at <https://www.cenews.net/stories/1060887843>.

Duty to Preserve Records

EPA must preserve all the records requested herein while this FOIA is pending or under appeal. 40 C.F.R. § 2.106 (“[r]ecords shall not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the FOIA”); *see Chambers v. U.S. Dep’t of Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009) (“an agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under FOIA or the Privacy Act”). Accordingly, please immediately advise custodians of potentially responsive records that the above records have been requested under FOIA and therefore may not be destroyed.

If any of the requested records are destroyed, the agency and responsible officials are subject to attorney fee awards and sanctions, including fines and disciplinary action. A court held EPA in contempt for “contumacious conduct” and ordered the agency to pay plaintiff’s costs and fees for destroying “potentially responsive material contained on hard drives and email backup tapes.” *Landmark Legal Found. v. EPA*, 272 F.Supp.2d 59, 62 (D.D.C. 2003); *see also Judicial Watch, Inc. v. Dep’t of Commerce*, 384 F. Supp. 2d 163, 169 (D.D.C. 2005) (awarding attorneys’ fees and costs because, among other factors, agency’s “initial search was unlawful and egregiously mishandled and ...likely responsive documents were destroyed and removed”), *aff’d in relevant part*, 470 F.3d 363, 375 (D.C. Cir. 2006) (remanding in part to recalculate attorney fees assessed). In another case, in addition to imposing a \$10,000 fine and awarding attorneys’ fees and costs, the court found that an Assistant United States Attorney prematurely “destroyed records responsive to [the] FOIA request while [the FOIA] litigation was pending” and referred him to the Department of Justice’s Office of Professional Responsibility. *Jefferson v. Reno*, 123 F. Supp. 2d 1, 6 (D.D.C. 2000).

EXEMPT RECORDS

Should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for the Sierra Club to appeal the denial. To comply with legal requirements, the following information must be included:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and deliver the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide records in the format requested if the record is readily reproducible by the agency in that format. *See, e.g.*, 5 U.S.C. § 552(a)(3)(B). We request that you provide electronic documents individually, and not as batched files. Specifically, for any document

stored as Electronically Stored Information (ESI), we request that the document be produced in the native file type. This includes e-mail (whether sent, received or drafted), word-processing files, tables, charts, graphs and database files, electronic calendars, proprietary software files, and spreadsheets. ESI can also be provided in the form of a load file that includes a common file type (TIFF, HTML, PDF) while maintaining access to the native file and its source data, including the ability to keyword search documents.

RECORD DELIVERY

We appreciate a prompt determination on the requested records. As mandated in FOIA, we anticipate a reply within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i) ; 40 C.F.R. § 2.104. Please email copies of the requested records to the e-mail address below. Please deliver documents that are not available in an electronic format to the physical address below. Failure to comply within the statutory timeframe may result in Sierra Club filing an action before the relevant U.S. District Court to ensure timely receipt of the requested materials.

Deliver electronic documents to:

Joshua Smith, Sierra Club
joshua.smith@sierraclub.org

Deliver other documents to:

Joshua Smith, Senior Attorney
Sierra Club - Environmental Law Program
2101 Webster Street, Suite 1300
Oakland, CA 94612

Please send documents on a rolling basis. EPA's search for—or deliberations concerning—certain records should not delay the production of others that EPA has already retrieved and elected to produce. *See generally* 40 C.F.R. § 2.104 (describing response deadlines).

FEE WAIVER REQUEST

I respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l).³

³ With the award-winning Sierra magazine and its extensive use of blogs to communicate with the public, Sierra Club would also be eligible for a fee waiver as a media requestor. 5 U.S.C. § 552(a)(4)(A)(ii); 40 C.F.R. § 2.107(c)(1)(iii); *see also* 40 C.F.R. § 2.107(b)(6) (defining “[r]epresentative of the news media”). A representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); *see also Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public).

Sierra Club is the nation's oldest grassroots non-profit organization with more than 3.5 million members and supporters nationwide and with tens of thousands of members, supporters, and local chapters in Texas. Sierra Club has played significant roles in numerous administrative and judicial proceedings that directly relate to the enforcement and implementation of regional haze rulemakings and state and federal implementation plans. In particular, Sierra Club has participated in several rulemakings and judicial proceedings related to implementation and enforcement of the health based standard for sulfur dioxide pollution in Texas. Sierra Club has spent years promoting the public interest through the development of policies that protect human health and the environment, and has routinely received fee waivers under FOIA.⁴

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as Sierra Club access to government records without the payment of fees. *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984) (fee waiver provision intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and non-profit public interest groups.").

As explained below, this FOIA request satisfies the factors listed in EPA's governing regulations for waiver or reduction of fees, as well as the requirements for a fee waiver under the FOIA statute – that "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii), *see also* 40 C.F.R. § 2.107(l).

1. The subject matter of the requested records specifically concerns identifiable "operations and activities of the government."

The requested records relate to communications by Anne Idsal, Acting Assistant Administrator for the OAR of the U.S. EPA with external parties that are directly regulated by EPA or represent regulated parties. These records will contribute to an understanding of the operations and actions of the EPA under the Trump Administration as they relate to Texas Regional Haze and the Texas SO₂ SIP. By their very definition, these activities are "identifiable operations or activities of the government."

⁴ For recent examples, *see* FOIA Request Reference Nos. EPA-HQ-2018-011215 and EPA-HQ-2018-01217 (fee letter waiver received Sept. 12, 2018); FOIA Request Reference Nos. EPA-HQ-2018-011216 and EPA-HQ-2018-011218 (fee letter waiver received Sept. 11, 2018).

2. The disclosure of the requested documents would be meaningfully informative and “likely to contribute to an understanding of Federal government operations or activities.”

Disclosure of the requested records will allow Sierra Club to convey information to the public about the communications and correspondence of Ms. Idsal and regarding ethics or conflict of interest review for Ms. Idsal, which will reflect the actions, objectives, and priorities under the Trump Administration relating to Texas Regional Haze and the Texas SO₂ SIP, two matters from which Ms. Idsal originally recused herself in July 2018.⁵ In a recent Updated Recusal Statement, Ms. Idsal claimed that her participation in those matters was insubstantial, and therefore, any future participation of Ms. Idsal in Texas Regional Haze and the Texas SO₂ SIP would face no objections from TCEQ or the Office of General Counsel/Ethics.⁶

In her role as Acting Assistant Administrator for OAR, Ms. Idsal will be working on regional haze rulemaking in Texas, for which a supplemental notice of proposed rulemaking is expected to be issued this fall.⁷ The proposed rulemaking is a source of significant public concern, and the public at large and Sierra Club membership are extremely concerned that EPA is working to further the fortunes of industry representatives rather than to ensuring a healthy and safe environment for American families.

Once the requested documents are made available, Sierra Club will analyze them and present its findings to its members and online activists and the general public in a manner that will meaningfully enhance the public’s understanding of how Ms. Idsal is acting and operating within the EPA, particularly with respect to plans to Texas Regional Haze and Texas SO₂ SIP. The documents requested will thus be “meaningfully informative” and “likely to contribute” to an understanding of EPA’s operations.

The requested records are not otherwise in the public domain and are not accessible other than through a FOIA request. Indeed, the request explicitly excludes those documents already available through regulations.gov. Thus, the requested documents provide information that is not already in the public domain and is accordingly likely to meaningfully contribute to public understanding of governmental operations.

3. The disclosure would contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons.

Sierra Club has longstanding experience and expertise in the subject area of the FOIA requests, including issues related to government accountability and transparency, and the activities that properly fall within the mission of the EPA.

⁵ See EPA, Office of the Regional Administrator, Anne Idsal Recusal Statement Memorandum at 3 (July 24, 2018), available at https://www.eenews.net/assets/2018/08/06/document_gw_05.pdf.

⁶ See EPA, Office of the Regional Administrator, Anne Idsal Updated Recusal Statement Memorandum at 3 (May 15, 2019), available at https://www.eenews.net/assets/2019/08/08/document_gw_04.pdf.

⁷ Reilly, Sean, E&E News, EPA plans changes to Texas haze proposal (Aug. 1, 2019), available at <https://www.eenews.net/greenwire/stories/1060823937/>.

Sierra Club disseminates the information it receives through FOIA requests in a variety of ways, such as: analysis and distribution to the media, distribution through publication and mailing, posting on its website, emailing and list serve distribution to our members across the U.S., and via public meetings and events. Every year the Sierra Club website receives 26,298,200 unique visits and over 30 million page views; on average, the site gets 72,049 visits per day. Sierra Magazine is a bi-monthly magazine with a printed circulation of approximately 650,000 copies. Sierra Club Insider, an electronic newsletter, is sent to nearly 3.5 million people twice a month. In addition, Sierra Club disseminates information obtained by FOIA requests through comments to administrative agencies.⁸

Sierra Club intends to share the information received from this FOIA request with the general public, our impacted members across the country, the media and our allies who share a common interest in the operations of the EPA.

Sierra Club unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner outlined above, and to do so in a manner that contributes to the understanding of the “public-at-large.”

4. The disclosure would contribute “significantly” to public understanding of government operations or activities.

As discussed in section (2) above, the records requested will significantly contribute to the public understanding of governmental operations and activities. Disclosure of EPA’s ethics or conflict of interest review relating to Texas Regional Haze and Texas SO₂ SIP for Ms. Idsal, as well as communications regarding these matters, will significantly enhance the public’s understanding of whether EPA is advancing its stated mission to protect public health and the environment, or whether EPA is advancing the agenda of polluters.

5. The requester has no commercial interest that would be furthered by the requested disclosure.⁹

Sierra Club has no commercial interest in the requested records. Nor does it have any intention to use these records in any manner that “furthers a commercial, trade, or profit interest” as those terms are commonly understood. Sierra Club is a nonprofit, tax-exempt organization under sections

⁸ For example, Sierra Club recently publicized results of its FOIA requests regarding outside influence on foreign travel at the EPA, a story that was picked by the New York Times. Lisa Friedman, Eric Lipton and Kenneth P. Vogel, *Ex-Lobbyist for Foreign Governments Helped Plan Pruitt Trip to Australia*, The New York Times, <https://www.nytimes.com/2018/05/02/climate/epa-pruitt-australia-travel.html>. Sierra Club also recently publicized the results of its FOIA requests regarding agency job freezes, a story that was picked up by the Washington Post. Alexander Rony, *Trump Admin Policy Leaves 700 CDC Jobs Vacant*, The Planet, <http://www.sierraclub.org/planet/2017/05/trump-admin-policies-leave-700-cdc-jobs-vacant>; Lena H. Sun, *Nearly 700 vacancies at CDC because of Trump administration’s hiring freeze*, The Washington Post, https://www.washingtonpost.com/news/to-your-health/wp/2017/05/19/nearly-700-vacancies-at-cdc-because-of-trump-administration-hiring-freeze/?utm_term=.6c2e70d8581e.

⁹ Because Sierra Club has no commercial interest, the Club also satisfies the final factor for a fee waiver, which compares the magnitude of an identified commercial interest to the public interest in disclosure.

501(c)(3) and 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of Sierra Club's mission to inform the public on matters of vital importance to the environment and public health.

Sierra Club respectfully requests that EPA waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A) because the public will be the primary beneficiary of this requested information. In the event that your agency denies a fee waiver, please send a written explanation for the denial. Please do not incur expenses beyond \$250 without first contacting our office for explicit authorization.

Thank you for your cooperation. If you find that this request is unclear in any way please do not hesitate to call me at (415) 977-5560 or email me at joshua.smith@sierraclub.org.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Joshua Smith', with a long horizontal stroke extending to the right.

Joshua Smith
Sierra Club
Environmental Law Program
2101 Webster Street, Suite 1300
Oakland, CA 94612